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No. 08-681

In the Supreme Court of the United States

JEAN MARC NKEN, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The question presented as formulated by this Court is:

Whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in Section 242(f)(2) of the Immigration and Nationality Act, 8 U.S.C. 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief.

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OPINIONS BELOW

The order of the court of appeals denying petitioner's motion for a stay of removal (J.A. 74) is unreported. The decisions of the Board of Immigration Appeals denying petitioner's stay motion (J.A. 69) and motion to reopen (J.A. 70-73) are unreported.

JURISDICTION

The order of the court of appeals was entered on November 5, 2008. The application for a stay of removal was filed in this Court on November 7, 2008. On November 25, 2008, the Court granted the application, treated it as a petition for a writ of certiorari, and granted the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

Petitioner is a citizen of Cameroon who entered the United States on a transit visa in 2001 and has remained here without authorization ever since. He claims that he will be persecuted if returned to Cameroon because he participated in a political demonstration in 1990. An immigration judge (IJ) determined that petitioner was not credible and denied relief, the Board of Immigration Appeals (Board) affirmed, and the court of appeals denied his petition for review.

Petitioner then filed three successive motions to reopen his case. In the third motion, he attempts to revive his claim of persecution based on changed country conditions in Cameroon. The Board denied the motion and denied petitioner's accompanying motion for a stay of removal. The court of appeals denied petitioner's motion to stay his removal pending judicial review. Petitioner now contends that the court used the incorrect standard in evaluating his stay motion.

1. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to streamline judicial review of aliens' claims and expedite the removal of illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. IIRIRA made three amendments to the INA that are particularly relevant here.

First, IIRIRA modified a provision of the INA that previously had provided for an automatic stay of the enforcement of a removal order upon the filing of a peti-

tion for review in a court of appeals. As a result, the INA now provides that "[s]ervice of the petition [for judicial review] * * * *does not* stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." IIRIRA § 306(a)(2), 110 Stat. 3009-608 (emphasis added) (enacting 8 U.S.C. 1252(b)(3)(B)).

Second, Congress repealed a provision of the INA that had barred further consideration of a petition for review following an alien's departure or removal from the United States. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)). Post-IIRIRA, therefore, "an alien may continue to prosecute his appeal of a final order of removal even after he departs the United States." *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 192 (4th Cir. 2004); see *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2320 (2008).

Third, Congress enacted a new provision, which states that "no court shall enjoin the removal of any alien pursuant to a final order under [8 U.S.C. 1252] unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." IIRIRA § 306(a)(2), 110 Stat. 3009-612 (enacting 8 U.S.C. 1252(f)(2)). That provision is at issue here.

2. a. Petitioner is a native and citizen of Cameroon who entered the United States in 2001 on a transit visa. J.A. 9. He overstayed his visa and was charged with being removable from the United States. J.A. 8-9; see 8 U.S.C. 1227(a)(1)(B).

Petitioner conceded that he was removable but sought asylum. J.A. 9-10. He contended that he would be persecuted if returned to Cameroon because he had participated in a student demonstration against the gov-

ernment in 1990. A.R. 826-831. He stated that he left Cameroon shortly after the demonstration and spent the following decade attending school in the Ivory Coast. A.R. 826-828. He claimed that when he returned to Cameroon in 2000, he was arrested, jailed for one month, and released. A.R. 828. Petitioner then traveled to the Bahamas to attend a medical conference, remained there for about two months, entered the United States en route home to Cameroon, and decided to remain here. *Ibid.*; see J.A. 11.

The IJ deemed petitioner's asylum application to also encompass requests for withholding of removal and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. J.A. 9-10. The IJ held a hearing on those claims, at which petitioner testified. A.R. 570-634.

b. The IJ determined that petitioner was removable as charged and denied his claims for asylum, withholding of removal, and CAT protection. J.A. 8-23. She found petitioner's story about why he left Cameroon in 1990 "improbable," J.A. 18; "question[ed]" petitioner's account of his arrest when he returned to Cameroon in 2000, J.A. 20; noted that petitioner's answers to various questions were "vague[]" and "evasive[]," J.A. 20-21; and "doubt[ed] that [petitioner] was being totally forthcoming with the Court," J.A. 21.

In particular, the IJ explained that petitioner's claim that he fled Cameroon in 1990 because of fear of persecution was undermined by the fact that he never sought asylum in the Ivory Coast and appeared to have previously arranged to attend school there. J.A. 18-19. The IJ also determined that petitioner provided incomplete

and conflicting testimony about how he supported himself in the Ivory Coast, and that his account of his 2000 arrest was not believable. J.A. 20-22. The IJ noted numerous discrepancies between petitioner's initial asylum application and his amended application and testimony, such as his testimony regarding the role he played in the 1990 student demonstration. J.A. 19. The IJ also stated that various letters that petitioner claimed to have been written by his father and brother could not be authenticated because petitioner "presented no proof as to [his] relationship" with those individuals. J.A. 22.

c. The Board remanded petitioner's case to the IJ, J.A. 30-31, because although the IJ had "raised numerous problems relating to [petitioner's] credibility," she had not "ma[de] a specific adverse credibility finding," J.A. 31. On remand, the IJ made an adverse credibility finding and denied petitioner's claims. J.A. 32-37. The IJ incorporated her prior decision, observing that petitioner's testimony was "incredible," "improbable," and riddled with inconsistencies. J.A. 34-36.

d. Petitioner appealed to the Board, then filed a motion to remand his case so that he could seek adjustment of status based on his marriage to a United States citizen. A.R. 314-317, 364-367. The Board affirmed the IJ's denial of relief. J.A. 44-49. It upheld the IJ's adverse credibility finding, explaining that petitioner "ha[d] not made any attempt to address the contradictory evidence of his political activities in Cameroon" in 1990, J.A. 46; had "provided divergent accounts of the events following his release from prison in 1990," *ibid.*; had "failed to address" why he never sought asylum in the Ivory Coast and how he was able to immediately begin studies when he arrived there, J.A. 47; and had submitted purportedly official documents with "incorrect spellings and nonsen-

sical statements," *ibid.* See J.A. 47-48 (summarizing "inconsistencies and implausibilities in the record"). The Board also denied petitioner's remand motion, explaining that petitioner was not eligible to adjust his status because the relative visa petition filed on his behalf had not been approved. J.A. 48; see 8 U.S.C. 1255(a) (alien is not eligible to adjust status unless "an immigrant visa is immediately available to him").

Petitioner filed a motion to reopen his case, asking the Board to reconsider its decision. A.R. 284-289. The Board denied the motion because petitioner had not "submitted any material evidence that was previously unavailable" or "made any arguments that were not already considered." J.A. 50.

e. The court of appeals denied petitioner's petition for review. J.A. 51-54. It concluded that "substantial evidence support[ed] both the immigration judge's adverse credibility finding and [her] ultimate findings that [petitioner] is ineligible for asylum, withholding of removal, and protection under the CAT." J.A. 53. The court also concluded that the Board appropriately denied petitioner's remand motion because petitioner was ineligible to adjust his status. *Ibid.*

3. While his petition for review was pending, petitioner filed a second motion to reopen his case, A.R. 155-160, in which he sought to adjust his status because the visa petition had been approved, A.R. 156. The Board denied the motion, explaining that petitioner had "exceed[ed] the numerical limitations on motions to reopen," and none of the exceptions to the rule that an alien may only file one motion to reopen applied. J.A. 55 (citing 8 C.F.R. 1003.2(c)(2)).

The court of appeals denied petitioner's petition for review, concluding that the Board had not abused its discretion in denying the motion to reopen. J.A. 56-57.

4. Petitioner then filed a third motion to reopen his case, J.A. 58-64, seeking to renew his asylum claim based on changed country conditions in Cameroon, J.A. 61. He argued that he would be persecuted if returned to Cameroon, based on his political activities almost two decades ago, because the Cameroonian president, who had already been in power for over twenty-five years, stated his intention to amend the constitution to be president for life. J.A. 60-61. Petitioner attached a letter that he claimed was from his brother, J.A. 65-68; undated photos of himself allegedly taken at a demonstration in front of the Embassy of Cameroon, A.R. 123-126; and recent news articles about civil unrest in Cameroon, A.R. 128-143. Petitioner also sought reopening to adjust his status, even though the Board had twice rejected that request. J.A. 63.[1]

The Board denied the motion to reopen. J.A. 70-73. It acknowledged that the statutory limitations on motions to reopen do not apply if the alien seeks asylum or withholding "based on changed country conditions" and presents "evidence [that] is material and was not available and could not have been discovered or presented" before. J.A. 70; see 8 U.S.C. 1229a(c)(7)(C)(ii); 8 C.F.R. 1003.2(c)(3)(ii). But the Board determined that petitioner had failed to demonstrate changed country conditions. J.A. 71. The Board observed that petitioner "failed to submit his own statement or asylum application articulating his persecution claim based on recent

[1] Petitioner also sought a stay of removal. A.R. 8-13. The Board denied that motion, explaining that "there [wa]s little likelihood that the motion [to reopen] w[ould] be granted." J.A. 69.

reports of civil unrest in Cameroon," and found that failure "significant in this case" because the agency had already determined that petitioner was not credible. *Ibid*. The Board also noted that petitioner "fail[ed] to provide any details" regarding the photographs he submitted; any discussion of "how his participation in an event in the United States alters his asylum claim"; and any explanation of how civil unrest in Cameroon altered his claim in light of the rule that civil unrest alone does not establish persecution. J.A. 71-72. The Board also declined to reopen petitioner's proceedings sua sponte to permit him to adjust his status, because petitioner failed to demonstrate the "exceptional circumstances" that would justify reconsidering his claim. J.A. 72.

5. After filing his third motion to reopen but before the Board's decision, petitioner sought habeas corpus relief in district court. See 08-01010 Emergency Pet. for a Writ of Habeas Corpus (D.D.C. June 13, 2008) (Habeas Pet.). He sought to relitigate the claims the Board had rejected, and he asked the district court to enter an injunction forbidding "the United States and all of its officers" from removing him from the United States while his motion to reopen was pending. Habeas Pet. 1-2, 18. The district court denied the petition "insofar as it requests injunctive relief in the form of a stay of [p]etitioner's impending removal from the United States." 08-01010 Order (D.D.C. June 18, 2008).[2]

6. Petitioner filed a petition for review of the Board's denial of reopening and sought a stay of removal from the court of appeals. He argued that he was entitled to a stay under both the standard contained in

[2] The United States has moved to dismiss the remainder of the petition for lack of jurisdiction, see 08-01010 Mot. to Dismiss (D.D.C. July 29, 2008), and that motion is pending.

8 U.S.C. 1252(f)(2) and under the four-part standard for preliminary injunctive relief. 08-1313 Pet. C.A. Stay Mot. 6-17. The government opposed that motion, explaining that the Section 1252(f)(2) standard applied under *Teshome-Gebreegziabher* v. *Mukasey*, 528 F.3d 330, 331 (4th Cir. 2008), and that petitioner did not meet that standard. 08-1313 Gov't C.A. Stay Opp. 7-11.

The court of appeals denied petitioner's stay application in an unpublished order. J.A. 74.

SUMMARY OF ARGUMENT

I. Petitioner's request for a court order preventing the Executive Branch from carrying out a final order of removal should be evaluated using the standard in 8 U.S.C. 1252(f)(2).

A. By its plain terms, Section 1252(f)(2) applies to any court order that would "enjoin" an individual alien's removal. That is precisely the relief petitioner seeks. An injunction is a court order prohibiting a person from taking, or requiring a person to take, a specified act. In his stay motion, petitioner asked the court of appeals to enter an order preventing Executive Branch officials from removing him, even though they have full authority to do so. Such an order would "enjoin the removal of any alien," and Section 1252(f)(2) therefore applies. Petitioner's insistence that he seeks a "stay" does not warrant a different conclusion, both because a stay is a type of injunction, and because an order preventing removal of an alien is naturally termed an injunction.

B. The statutory context confirms that Section 1252(f)(2) applies to requests for stays of removal. That provision is located within Section 1252, which comprehensively regulates judicial review of final orders of removal. It is preceded by Section 1252(b)(3)(B), which

states, as a procedural matter, that the filing of a petition for review does not automatically stay removal. And it is part of Section 1252(f), which provides in broad terms both that aliens may not obtain class-wide relief to enjoin operation of the immigration laws, 8 U.S.C. 1252(f)(1), and that individual aliens are limited in obtaining injunctive relief to avoid removal, 8 U.S.C. 1252(f)(2). Petitioner's interpretation gives no meaning to Section 1252(f)(2), and it therefore should be rejected.

C. The drafting history confirms that Section 1252(f)(2) applies here. In IIRIRA, Congress amended the INA to streamline judicial review and expedite the removal of illegal aliens. Congress shifted from the pre-IIRIRA scheme, under which most aliens were permitted to remain in the United States pending judicial review, to a new scheme whereby most aliens would be required to pursue their claims from their home countries. Section 1252(f)(2) is an important part of that effort, because it heightens the standard that must be met for a court to allow an alien to stay in the United States pending judicial review.

D. Applying the Section 1252(f)(2) standard to stays of removal furthers Congress's purposes in enacting IIRIRA. Congress made the policy judgment that when an alien's claims have twice been rejected by the agency, that alien should not be permitted to remain in the United States pending further review. As this case amply demonstrates, there are many ways in which aliens with non-meritorious claims may seek to manipulate the judicial system to delay their removal. Section 1252(f)(2) serves to discourage such actions.

E. No canon of statutory interpretation overrides the clear import of Section 1252(f)(2). The choice of one

stay standard over another does not raise any Suspension Clause concerns, and this is not a context in which Congress would have wished an ambiguity to be resolved in favor of an alien.

II. Even if this Court concludes that the standard in Section 1252(f)(2) does not apply, it should affirm the denial of petitioner's motion because petitioner cannot prevail even under the traditional test for preliminary injunctive relief. Petitioner advocates a watered-down version of the four-part standard for preliminary injunctive relief. This Court therefore should reiterate that the four-part standard requires a likelihood (not a possibility) of success on the merits and irreparable injury and that there are significant public burdens attendant to permitting an illegal alien to remain in the United States. Under a proper application of that standard, petitioner is not entitled to a stay.

ARGUMENT

I. SECTION 1252(f)(2) GOVERNS WHETHER A COURT OF APPEALS SHOULD BAR AN ALIEN'S REMOVAL PENDING CONSIDERATION OF HIS PETITION FOR REVIEW

A. The Text Of Section 1252(f)(2) Plainly Provides The Standard For Evaluating A Motion To Bar Removal Pending Judicial Review

As in any case of statutory construction, this Court's analysis "begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). At issue here is 8 U.S.C. 1252(f)(2), which states: "Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is

prohibited as a matter of law." The question is whether Section 1252(f)(2) provides the standard for a court of appeals to use when an alien seeks to prevent the Executive Branch from removing him while his petition for review is pending. The answer is yes. That is because Section 1252(f)(2) uses broad language, including the expansive term "enjoin," to encompass any effort by the courts to prevent the Executive Branch from executing a final order of removal.

1. As an initial matter, the comprehensive language Congress used in Section 1252(f)(2) demonstrates that the provision applies broadly to any judicial order that would have the effect of preventing any alien's removal. The introductory clause—"[n]otwithstanding any other provision of law," 8 U.S.C. 1252(f)(2)—establishes that Section 1252(f)(2) supersedes all other statutory provisions that might apply to efforts by aliens to forestall their removal. See *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993). Congress provided a mandatory prohibition on the courts, stating in plain terms that "no court shall" enjoin an alien's removal unless a certain standard is met. 8 U.S.C. 1252(f)(2). Congress then applied that prohibition to "the removal of *any* alien." *Ibid.* (emphasis added). "[T]he word 'any' has an expansive meaning." *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008). Here, it demonstrates that Section 1252(f)(2) applies to all aliens who ask the courts to prevent their removal. Finally, Congress provided a narrow exception to its general prohibition, providing that a court may enjoin execution of a removal order if the alien "shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U.S.C. 1252(f)(2). Taken together, those provisions make plain Congress's intention to per-

mit a reviewing court to enjoin the execution of a removal order only in limited circumstances.

The remaining question, then, is whether a court order precluding Executive Branch officials from executing a final order of removal is an order "enjoin[ing] the removal" of the alien. 8 U.S.C. 1252(f)(2). The term "enjoin" is not defined in Section 1252(f)(2) or elsewhere in the INA, and it therefore should be given its ordinary meaning. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994). In its customary usage, "enjoin" means to "require," "command," or "direct" an action, or to "require a person * * * to perform, or to abstain or desist from, some act." *Black's Law Dictionary* 529 (6th ed. 1990) (*Black's*). Accordingly, an "injunction" is "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." *Id.* at 784. See, *e.g.*, *Webster's Third New International Dictionary of the English Language* 754 (1993) ("enjoin" is "to direct, prescribe, or impose by order"; "to prohibit or restrain by a judicial order or decree"); *id.* at 1164 (an "injunction" is "the act or an instance of enjoining"; "an equitable writ * * * whereby one is required to do or refrain from doing a specified act").

When an alien subject to a final order of removal seeks an order barring Executive officers from removing him while his petition for review is pending, he is seeking to "enjoin" his removal. That is because a judicially granted stay of removal "require[s]" DHS to "abstain" from doing "some act," *Black's* 529, *i.e.*, the act of "remov[ing] * * * [the] alien pursuant to a final order" of removal, 8 U.S.C. 1252(f)(2). Here, petitioner seeks to remain in the United States while the court of appeals considers his challenge to the Board's denial of his third motion to reopen. Pet. C.A. Stay Mot. 1. Because his

removal order has long been final, that can only be accomplished through a court order barring DHS from removing him. Petitioner therefore seeks to "enjoin" his removal, and the Section 1252(f)(2) standard applies.

2. Petitioner contends (Br. 20-28) that Section 1252(f)(2) is inapplicable because he seeks a "stay," which in his view is fundamentally different from an injunction. He is mistaken, both because a stay is a type of injunction, and because the relief petitioner seeks is naturally characterized as an injunction.

In ordinary usage, a "stay" is "[a] stopping"; an "act of arresting a judicial proceeding by the order of a court"; or "a suspension of the case or some designated proceedings within it." *Black's* 1413. A stay is "a kind of injunction," because a court entering a stay directs judicial proceedings to be frozen at a particular point in time. *Ibid.*; see *ibid.* (definition of "stay" cross-references definition of "injunction"). The term "stay," then, "is a subset of the broader term 'enjoin,'" *Teshome-Gebreegziabher*, 528 F.3d at 333, and "the plain meaning of enjoin includes the grant of a stay," *Weng* v. *United States Att'y Gen.*, 287 F.3d 1335, 1338 (11th Cir. 2002) (citing cases).

Accordingly, statutes and courts often speak of entering an "injunction" to "stay" judicial proceedings. For example, in the Anti-Injunction Act, Congress provided that "[a] court of the United States may not grant an injunction to stay proceedings in a State court." 28 U.S.C. 2283; see *Roudebush* v. *Hartke*, 405 U.S. 15, 20-21 (1972). Similarly, in the Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341 *et seq.*, Congress used "injunction" interchangeably with "stay" to describe judicial orders barring enforcement of administrative orders pending judicial review in the court

of appeals. Thus, Congress provided that the filing of a petition for review "does not of itself stay or suspend the operation of the order of the agency," but that a court may issue an "interlocutory injunction" "restraining or suspending" the "enforcement, operation, or execution" of the order pending a final decision on the petition for review. 28 U.S.C. 2349(b).[3] Congress's use of the term "injunction" in the Hobbs Act to describe a judicial order barring enforcement or execution of an agency order pending judicial review is especially instructive, because Congress expressly provided that judicial review under the INA would be pursuant to the Hobbs Act. See 8 U.S.C. 1252(a)(1).

This Court too has long recognized that an injunction may operate to stay a matter. See, *e.g.*, *Hill* v. *McDonough*, 547 U.S. 573, 578-580 (2006) (habeas petitioner sought injunction to stay his execution); *McMillen* v. *Anderson*, 95 U.S. 37, 42 (1877) ("[Petitioner] can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction."). The courts of appeals likewise have acknowledged that a stay is a type of injunction. See, *e.g.*, *Kijowska* v. *Haines*, 463 F.3d 583, 589 (7th Cir. 2006) (stay "is a form of injunction"); *Nivens* v. *Gilchrist*, 319 F.3d 151, 153 (4th Cir. 2003) (denial of "injunction" to "stay [a] trial"); *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539, 1546 (11th Cir. 1996) (automatic stay is "essentially a court-ordered injunction").

Petitioner implicitly recognizes that the broad term "enjoin" may include a "stay," because he argues that his stay motion should be evaluated using the four-factor standard traditionally used for assessing the appropri-

[3] Section 2349(b) also provides for a "temporary stay or suspension" of an administrative order for up to 60 days pending a hearing on an application for the "interlocutory injunction."

ateness of a *preliminary injunction.* That standard was widely used prior to Section 1252(f)(2)'s enactment to adjudicate requests by aliens seeking to avoid removal, see, *e.g.*, *Ignacio* v. *INS*, 955 F.2d 295, 299 & n.5 (5th Cir. 1992); see also Pet. Br. 4-5, and it is still used by courts that refuse to apply Section 1252(f)(2) to such requests, see, *e.g.*, *Arevalo* v. *Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003). Use of that standard "signal[s] that [those courts] understand aliens facing agency-ordered removal are seeking injunctive relief when they ask for a stay." *Teshome-Gebreegziabher* v. *Mukasey*, 545 F.3d 285, 287 (4th Cir. 2008) (Shedd, J., concurring in denial of reh'g en banc).

3. Even if one were to distinguish between injunctions and stays, the relief petitioner seeks is better termed an injunction, rather than a stay. In its most customary usage, a stay is a tool by which a court freezes its own proceedings or suspends the operation of its own decisions or those of an inferior court pending further review. See *Black's* 1413 (defining "stay" as an "act of arresting a judicial proceeding by the order of a court" or "a suspension of the case or some designated proceedings within it").

As petitioner observes (Br. 21-23), stays sometimes may be distinguished from injunctions on the basis that a stay typically deprives a judicial order of the force of law pending further proceedings, while an injunction typically requires a person or entity to act or refrain from acting. That distinction does not help petitioner, because he is not asking the court of appeals to suspend its own proceedings or the effect of a lower court decision as part of a "single unified process" in the Article III courts; petitioner is seeking "not a mandate from court to court but from court to an administrative

agency." *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940). Petitioner is asking the court to prohibit an Executive Department from taking an action that would be entirely lawful in the absence of any involvement by a court. Because petitioner seeks a remedy (a court order) that forbids a party to a judicial proceeding (the Executive Branch), from taking an action it is fully authorized to take, the most natural label for that remedy is an injunction. See *Teshome-Gebreegziabher*, 545 F.3d at 287 (Shedd, J., concurring in denial of reh'g en banc).

Petitioner's own characterization of his motion as requesting a "stay" is not dispositive. Section 1252(f)(2) speaks in terms of the relief afforded by a court, not the relief sought by the alien. See 8 U.S.C. 1252(f)(2) ("no court shall enjoin the removal"); see also *Dorelien* v. *United States Att'y Gen.*, 317 F.3d 1314, 1319 (11th Cir. 2003) (Hull, J., concurring in denial of reh'g en banc) ("[T]he focus in § 1252(f)(2) is on the nature of the relief a *court* is granting, irrespective of the nomenclature used."). An alien facing removal who requests a "stay" should not be treated differently from one who seeks an "injunction"; "both [are] seeking the identical relief—stopping the Government from removing them." *Teshome-Gebreegziabher*, 545 F.3d at 287 (Shedd, J., concurring in denial of reh'g en banc).

In any event, it is notable that petitioner himself has characterized the relief he seeks as an injunction. In his habeas corpus petition in the district court, see p. 8, *supra*, he specifically requested that the court enter "a [p]reliminary [i]njunction against the United States and all of its officers" prohibiting his removal. Habeas Pet. 18. Petitioner's current stay motion likewise is a request for injunctive relief.

4. To be sure, the term "enjoin" or "injunction" does not necessarily include a "stay" in every context. But in the context of judicial review of a final order of removal, a request like petitioner's is best understood as a request to "enjoin" his removal. That is because Congress authorized immediate execution of the removal order once agency proceedings are complete and carefully circumscribed the judicial review available after that point.

When an alien is charged with being removable from the United States, an IJ has the initial task of determining whether the alien is in fact removable. 8 U.S.C. 1229a(a); 8 C.F.R. 1003.12, 1240.1(a)(1)(i). If, after considering any applications for relief, the IJ enters an order of removal, that order becomes final when the alien's appeal to the Board is unsuccessful or the alien declines to appeal to the Board. See 8 U.S.C. 1101(47)(B); 8 C.F.R. 1241.1, 1241.31. Once an order of removal has become final, it may be executed at any time. See 8 U.S.C. 1252(b)(8)(C); 8 C.F.R. 1241.33. Removal orders "are self-executing orders, not dependent upon judicial enforcement." *Stone* v. *INS*, 514 U.S. 386, 398 (1995).

An alien may seek review of a final order of removal by filing a petition for review in the appropriate court of appeals. 8 U.S.C. 1252(a)(1). However, because the alien's claim has already been considered, and rejected, by two different agency adjudicators, Congress limited that review in numerous respects, and some claims are not reviewable at all. 8 U.S.C. 1252(a)(2).

Those unique features of immigration proceedings make clear that an alien who seeks to avoid removal while his petition for review is pending is seeking an injunction. At that point, administrative proceedings are complete and the order of removal is final. See

8 U.S.C. 1252(a)(1) and (d). The status quo is that the alien is removable and will be removed. See 8 C.F.R. 1241.33. An alien who asks a court of appeals to enter an order permitting him to remain in the United States is not seeking to stay the court of appeals' proceedings or any administrative proceedings; he is seeking to upset the status quo and tie the hands of the Executive Branch.

The fact that the alien in that circumstance is seeking an injunction is made clear when one considers the other forms of relief available to the alien. He has essentially three options to remain in the United States pending judicial review: he may seek a discretionary administrative stay from DHS, 8 C.F.R. 241.6(a), 1241.6(a); file a motion to reopen or reconsider and seek a stay from the IJ or the Board, 8 C.F.R. 241.6(b), 1241.6(b);[4] or ask the court of appeals to prevent his removal. The first option could be termed a "stay," because DHS is deciding whether to stay its *own* hand. The second option likewise could be termed a "stay," because the agency that entered the removal order is delaying the effectiveness of its *own* order. The third option, unlike the first two, requires the court not to halt its own proceedings, but to prevent a party to judicial proceedings not to take an action, and it is therefore more properly termed an injunction. See 28 U.S.C. 2349(b).

5. Petitioner cites (Br. 23-25, 28-32) uses of the terms "stay" and "enjoin" in various other contexts to suggest that the term "enjoin" cannot encompass a "stay." Those references are largely beside the point,

[4] The filing of a motion to reopen or a motion for reconsideration does not automatically stay execution of the decision; a separate stay motion generally is required. See 8 C.F.R. 1003.23(b)(1)(v) and (4)(i).

because they ignore the specific context of the INA. Interpreting the term "enjoin" in Section 1252(f)(2) to include a stay request would not create confusion because of the specific ways in which Congress used the terms "stay" and "enjoin" in the INA.

In the INA, Congress used the word "stay" in two senses—to refer to the act of remaining in a given location,[5] and to refer to a stay of removal.[6] Recognizing that a stay in the latter context is a form of injunction in Section 1252(f)(2) does not create confusion about the term's use in the former context. Nor does it result in the term "enjoin" being incorrectly applied to an action by DHS or the Board to stay its own hand. That is because when Congress meant the word "stay" to refer to agency proceedings or orders, it explicitly said so. See 8 U.S.C. 1186a(d)(2)(C) ("[T]he Attorney General may stay such removal proceedings against an alien."), 1186b(d)(2)(C) (same).

At the same time, interpreting "enjoin" to include stays of removal does not create doubt about the other uses of "enjoin" in the INA. Those references, like the reference in Section 1252(f)(2), refer to actions that prevent a certain actor from engaging in a specified act.[7]

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[5] See 8 U.S.C. 1103(d)(2), 1182(a)(7)(B)(i)(I), (a)(9)(B)(ii) and (iv)(2), (*l*)(1) and (n)(2)(C)(v), 1184(a)(1), (c)(9)(A)(ii) and (11)(A)(ii), (k), (k)(3) and (n)(2)(B), 1202(c), (g) and (g)(1), 1225(a)(5), 1255a(a)(2)(B), 1351; 8 U.S.C. 1187(c)(8)(C)(ii)(I) and (i)(3) (Supp. I 2007).

[6] See 8 U.S.C. 1160(d), 1229a(b)(5)(C) and (c)(7)(C)(iv), 1229c(f), 1231(a)(1)(B)(ii) and (c)(2), 1252(b)(3)(B), 1255a(e).

[7] See 8 U.S.C. 1188(g)(2) (Secretary of Labor may "seek[] appropriate injunctive relief" against employers who violate regulations regarding temporary immigrant workers), 1227(a)(2)(E)(ii) (authorizing removal of "[a]ny alien who at any time after admission is enjoined under a protection order"), 1252(e)(1) ("no court may * * * enter declar-

Petitioner's references (Br. 23-25, 30-32) to other contexts provide no basis for limiting the term "enjoin" under the INA. For example, application of Section 1252(f)(2) to motions to prevent an alien's removal while a petition for review is pending does not create confusion about the applicability of Federal Rule of Civil Procedure 65 or Federal Rules of Appellate Procedure 8 and 18 to stay motions (see Pet. Br. 23-24), because only the latter apply in the courts of appeals, where petitions for review are adjudicated. Petitioner's citation (Br. 24-25) to *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271 (1988), likewise does not support his position. In holding that "orders granting or denying stays of 'legal' proceedings" are not automatically appealable as injunctions under 28 U.S.C. 1292(a)(1), this Court used the term "stay" in a particular sense, as referring to a court's decision to hold its own proceedings in abeyance. 485 U.S. at 273, 287-288. And it noted that it *would* treat as appealable under Section 1292(a)(1) "orders that have the practical effect of granting or denying injunctions." *Id.* at 287-288. That is precisely the case here: although petitioner termed his motion one for a "stay," he is seeking to "enjoin" DHS from taking any action to remove him, and Section 1252(f)(2) therefore applies.

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atory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with" the provision addressing inspection of aliens who arrive in the United States), 1252(f)(1) ("no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of" the immigration laws), 1324a(f) (providing "[c]riminal penalties and injunctions for pattern or practice violations" committed by employers of aliens not authorized for employment).

B. The Statutory Structure Confirms That Section 1252(f)(2) Governs Motions To Prevent Removal Pending Judicial Review

In addition to reviewing the text of the provision at issue, this Court determines the "plainness or ambiguity of statutory language" by looking to "the specific context in which that language is used" and "the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). Reading Section 1252(f)(2) in the context of Congress's comprehensive scheme for judicial review of final removal orders reinforces the conclusion that it applies to requests for stays of removal.

1. The statutory language at issue appears in Section 1252, the provision of the INA that provides a complete set of procedures and standards for judicial review. Section 1252 confers jurisdiction on the courts of appeals to review final orders of removal, 8 U.S.C. 1252(a), and requires that all challenges to removal orders be brought in a petition for review, 8 U.S.C. 1252(a)(5), (b)(9) and (g). It also places a number of limitations on the types of claims that are reviewable, the scope of review, and the remedies that are available. For example, Section 1252 precludes review of certain denials of discretionary relief and orders of removal entered against criminal aliens, 8 U.S.C. 1252(a)(2), and provides deferential standards of review for reviewing the agency's factual findings and discretionary decisions, 8 U.S.C. 1252(b)(4). It also addresses various procedural aspects of judicial review, requiring exhaustion of administrative remedies, 8 U.S.C. 1252(d)(1), and providing strict filing deadlines for briefs, 8 U.S.C. 1252(b)(3)(C).

Two portions of Section 1252 are relevant to evaluating stays of removal. First, Section 1252(b)(3)(B) states that, as a procedural matter, "[s]ervice of the petition [for review] on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." Cf. 28 U.S.C. 2349(b) (first sentence). That provision makes clear that the mere filing of a petition for review does not preclude DHS from removing the alien from the United States. But it does not provide a standard for courts to use in determining whether a stay of removal is warranted.

Second, Section 1252(f) provides substantive standards for when aliens may obtain certain types of relief. Section 1252(f)(1) provides that "no court (other than the Supreme Court) shall have jurisdiction or authority" to "enjoin or restrain" operation of the immigration laws, "other than with respect to the application of [the immigration laws] to an individual alien." As this Court has explained, Section 1252(f)(1) is addressed to attempts to enjoin operation of the immigration laws on a class-wide basis. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-482 (1999) (*AAADC*). Section 1252(f)(1) applies "[r]egardless of the nature of the action or claim or the identities of the party or parties bringing the action." 8 U.S.C. 1252(f)(1).

Section 1252(f)(2) is written in comparably sweeping terms and rounds out the restrictions on injunctive relief. Section 1252(f)(2) applies to requests for injunctive relief made by individual aliens, the situation expressly excluded from the reach of Section 1252(f)(1). See 8 U.S.C. 1252(f)(2) ("no court shall enjoin the removal of any alien"). And Section 1252(f)(2) concerns the enjoin-

ing of a particular act—DHS's "removal of any alien" from the United States. *Ibid.*

Read against the backdrop of Section 1252(b)(3)(B) and Section 1252(f)(1), it is clear that Section 1252(f)(2) encompasses a stay request made by an individual alien. Because Section 1252(b)(3)(B) does not provide a standard for evaluating stays of removal, it is natural to look to another part of Section 1252 for such a standard. See *Teshome-Gebreegziabher*, 545 F.3d at 288 (Shedd, J., concurring in denial of reh'g en banc) (concluding that the INA "offers only one standard [for adjudicating a request for stay of removal]—that found in § 1252(f)(2)"). Section 1252(f)(2) applies to stays of removal, because the term "enjoin" includes a court order preventing a party from taking a specific action ("the removal of an alien"). See pp. 13-14, *supra*. And Congress's use of the comprehensive term "enjoin," rather than the narrower term "stay," is consistent with its intention to broadly preclude the courts from taking actions to impede the execution of the immigration laws in Section 1252(f)(1) and (2).

The application of Section 1252(f)(2) to stays of removal is reinforced by Section 1252(g), which provides that, "[e]xcept as provided in [Section 1252] and notwithstanding any other provision of law (statutory or nonstatutory), * * * no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to * * * execute removal orders against any alien under this chapter." Section 1252(g) was intended, *inter alia*, to ensure that all potential actions with respect to stays of execution of removal orders will be in the courts of appeals as part of the proceedings on petition for review as specified in Section 1252, *AAADC*, 525 U.S. at

485, and where subsection (g) applies, it incorporates the rest of Section 1252, including subsection (f), *id.* at 487.

2. If Section 1252(f)(2) does not apply to an alien's request to stay his removal pending judicial review, "it is unclear when * * * [that provision] would ever apply." *Teshome-Gebreegziabher*, 528 F.3d at 334. That is because the *only* way to obtain "[j]udicial review of * * * questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien from the United States" is by way of a petition for judicial review of a final order of removal. 8 U.S.C. 1252(b)(9); accord 8 U.S.C. 1252(a)(5) and (g). Contrary to petitioner's suggestion (Br. 28), a court that concludes that an alien is entitled to relief in connection with a petition for review does "not 'enjoin' the removal of [that] alien"; "instead, [it] vacate[s] the agency's final order of removal." *Teshome-Gebreegziabher*, 528 F.3d at 334. Section 1252(f)(2) therefore cannot apply in that instance. Accordingly, if Section 1252(f)(2) does not apply to the interlocutory injunctive relief of a stay of removal pending adjudication of a petition for review, it likely has no application at all.

Petitioner suggests (Br. 37-38) that Section 1252(f)(2) serves the "independent purpose" of "preserv[ing] the ability of courts to grant injunctive relief" in cases "where neither § 1252(b)(9) nor § 1252(g) would apply to preclude judicial review outside the context of the underlying removal order itself." As petitioner himself notes (Br. 37), however, a final order of removal may be challenged only through a petition for review under Section 1252. See 8 U.S.C. 1252(a)(5), (b)(9) and (g). It is therefore difficult to imagine a situation in which an alien could seek an injunction to prevent removal that would not arise in the context of a petition for review.

Tellingly, petitioner does not provide any specific example of a claim that, in his view, would be evaluated using the standard contained in Section 1252(f)(2). Moreover, there are no published decisions in the courts of appeals that have applied the Section 1252(f)(2) standard outside the context of an alien's request for a stay of removal.

In any event, even if there might be some situation in which subsection (f)(2) of Section 1252 would apply other than a request for an injunction barring removal pending a petition for review under Section 1252, that would not detract from the conclusion that Section 1252(f)(2)'s principal application is in that context. Section 1252(f)(2) provides that "no court shall enjoin the removal of any alien pursuant to a final order *under this section.*" 8 U.S.C. 1252(f)(2) (emphasis added). The phrase "under this section" makes clear that Section 1252(f)(2) applies *at least* to injunctions entered in conjunction with petitions for review filed under "this section"—*i.e.*, Section 1252.

3. Petitioner suggests (Br. 33-34) that Section 1252(b)(3)(B) provides a standard for courts to use in evaluating stay requests, because by "establish[ing] that stays of removal would be discretionary rather than automatic," Congress indicated that the courts should evaluate stay requests using the four-part standard for preliminary injunctive relief. Petitioner is mistaken. Section 1252(b)(3)(B) gives courts the authority to enter an order staying removal ("unless the court orders otherwise"), but it does not specify that a stay may be granted "in the court's discretion" or provide any other standard for evaluating stay requests.

Petitioner also contends (Br. 33-34) that because the language used in Section 1252(b)(3)(B) is similar to the

language used in 8 U.S.C. 1105a(a)(3) (1994), the same substantive standard must be used for both. That is incorrect. Neither the pre-IIRIRA phrase "unless the court otherwise directs" nor the post-IIRIRA phrase "unless the court orders otherwise" states a standard. Pre-IIRIRA, therefore, courts could choose the usual four-part standard for preliminary injunctive relief. Congress's addition of a statutory standard in Section 1252(f)(2) foreclosed that option post-IIRIRA.

Petitioner errs in suggesting (Br. 33) that if Congress intended Section 1252(f)(2) to apply to stays of removal, it would have said so in Section 1252(b)(3)(B). Because Section 1252(b) relates primarily to the procedural aspects of petitions for review, it is unsurprising that Congress chose to put the substantive standard for injunctive relief in a separate subsection. In any event, no cross-reference is required to displace whatever standard might have been applied in the absence of Section 1252(f)(2), because Section 1252(f)(2) applies "[n]otwithstanding any other provision of law." 8 U.S.C. 1252(f)(2).

Petitioner asserts (Br. 35-36) that, if Section 1252(f)(2) sets forth the standard for evaluating aliens' stay requests, then Section 1252(b)(3)(B) becomes surplusage. That argument ignores the historical context in which Section 1252(b)(3)(B) was enacted. Because the INA had previously provided for an automatic stay of deportation upon the filing of a petition for review unless the court of appeals otherwise directed, 8 U.S.C. 1105a(a)(3) (1994), Congress decided to make explicit that it was eliminating that rule, 8 U.S.C. 1252(b)(3)(B). See pp. 29-31, *infra*. That also explains why Section 1252(b)(3)(B) uses the term "stay," rather than Section 1252(f)(2)'s comprehensive term "enjoin."

In petitioner's view (Br. 35), Section 1252(b)(3)(B) and Section 1252(f)(2) cannot both apply to stays of removal because Congress did not include Section 1252(f)(2) in its special transitional rules. But all that shows is that Congress decided not to apply the heightened standard in Section 1252(f)(2) to cases that were pending at the time of IIRIRA's enactment in order not to upset automatic stays (or orders abrogating such stays) that were already in effect, and to ensure that aliens had sufficient notice that it would be difficult to obtain a stay pending judicial review.

Finally, petitioner contends (Br. 36-37) that Section 1252(f)(2) does not apply to stays because in Section 1252(f)(1), the term "enjoin" refers to permanent injunctions, and the term "restrain" refers to preliminary injunctions. That is incorrect. "Nothing in the text of § 1252(f)(1) indicates that 'restrain' applies only to temporary relief while 'enjoin' applies to permanent relief." *Teshome-Gebreegziabher*, 528 F.3d at 333. The plain meaning of "enjoin" encompasses both temporary and permanent relief. See pp. 13-16, *supra*; see also, *e.g.*, *Winter* v. *NRDC*, 129 S. Ct. 365, 373-374 (2008) (plaintiffs sought a preliminary "injunction"). The term "restrain," in particular, is often used synonymously with "enjoin." *Black's* 1314 ("restrain" is "[t]o enjoin"); see also, *e.g.*, 29 U.S.C. 217 (authorizing "[i]njunction proceedings" to "restrain" violations of the Fair Labor Standards Act); *Arevalo*, 344 F.3d at 7 ("[C]ourts frequently use the terms 'enjoin' and 'restrain' interchangeably.").

Petitioner is also mistaken in suggesting (Br. 36-37) that "enjoin" must refer to permanent injunctive relief because the term is used in that sense in the Hobbs Act, upon which Section 1252 was modeled. The Hobbs Act

does not use the term "enjoin" to refer only to permanent relief. See 28 U.S.C. 2349(b) (authorizing an "interlocutory injunction"). Moreover, unlike orders of other agencies reviewable under the Hobbs Act, courts do not enter permanent injunctions against the Board or DHS in connection with individual petitions for review of final removal orders. See p. 25, *infra*. In any event, the meaning of "enjoin" is not limited based on its usage in the Hobbs Act, because Section 1252(f)(2) applies "[n]otwithstanding any other provision of law." 8 U.S.C. 1252(f)(2); see *Weng*, 287 F.3d at 1340 n.9; see also *Stone*, 514 U.S. at 397-398 (Hobbs Act tolling rule does not apply to motions to reopen under the INA). Section 1252(f)(2)'s context therefore demonstrates that it applies to an alien's efforts to prevent his removal from the United States pending consideration of his petition for review.

C. The Drafting History Confirms That Section 1252(f)(2) Applies To Stays Of Removal

In 1996, Congress enacted a sea change in immigration law when it enacted IIRIRA. IIRIRA was designed to streamline judicial review of final orders of removal and ensure the prompt removal of illegal aliens from the United States. A comparison of the pre- and post-IIRIRA regimes makes plain Congress's intent to apply Section 1252(f)(2) to motions for stays of removal pending judicial review.

1. Prior to IIRIRA, most aliens who were ordered removed from the United States were afforded an automatic stay of removal once they sought judicial review, unless the court "otherwise direct[ed]" or the alien had been "convicted of an aggravated felony." 8 U.S.C. 1105a(a)(3) (1994). The INA provided no standard for

courts to use in resolving stay issues. Consequently, the courts decided to treat an "application for a discretionary stay as a request for injunctive relief" and used the four-part standard for preliminary injunctive relief. See Pet. Br. 4-5.

At that time, the INA also provided that the courts of appeals lost jurisdiction over an alien's petition for review if the alien left the United States. See 8 U.S.C. 1105a(c) (1994). Because aliens could not obtain judicial review of their orders of removal from abroad, Congress presumptively permitted them to remain in the United States in order to do so.

2. IIRIRA fundamentally altered that scheme. See *AAADC*, 525 U.S. at 475 ("IIRIRA * * * repealed the old judicial-review scheme set forth in § 1105a and instituted a new (and significantly more restrictive) one in 8 U.S.C. § 1252."). As relevant here, IIRIRA eliminated the provision of the INA providing that the filing of a petition for review stays the alien's removal. § 306(b), 110 Stat. 3009-612. Moreover, Congress expressly stated that an alien's right to judicial review "does not require the Attorney General to defer removal of the alien." 8 U.S.C. 1252(b)(8)(C). As a result of those changes, removal at the conclusion of agency proceedings came to be the norm, rather than the exception.

In order to ensure that aliens could still obtain judicial review, Congress repealed the INA provision that prohibited courts from considering a petition for review if the alien departed or was removed from the United States. See IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)). As a result, the courts of appeals now retain jurisdiction over a petition for review after an alien leaves the United States. See, *e.g.*, *Dada*, 128 S. Ct. at 2320.

In addition to eliminating automatic stays and authorizing aliens to pursue petitions for review from abroad, Congress enacted Section 1252(f)(2). Section 1252(f)(2) heightened the standard for aliens who wish to remain in the United States pending judicial review. That provision, in conjunction with the other amendments, furthers Congress's goal of expediting removal of illegal aliens from the United States while ensuring the availability of judicial review.

IIRIRA thus altered the balance between courts and the Executive Branch when it comes to final orders of removal by fundamentally changing the nature of review once agency proceedings are complete. IIRIRA shifted the focus from court review to agency review, providing that an order of removal was immediately executable when agency proceedings are complete, even when a petition for review is filed. Rather than granting courts broad discretion to issue stays of removal, Congress limited the circumstances under which the courts could prevent removal, see 8 U.S.C. 1252(f)(2), so that the agency could exercise that discretionary authority, see 8 C.F.R. 241.6, 1241.6(a), 1241.33(a). As this Court has recognized, "protecting the Executive's discretion from the courts * * * can fairly be said to be the theme of the legislation." *AAADC*, 525 U.S. at 486.

3. Petitioner essentially ignores the profound effect of IIRIRA on the removal process. In his view (Pet. Br. 33-34), Congress intended stays of removal after IIRIRA to be evaluated using the same standard applied prior to IIRIRA. But IIRIRA's elimination of automatic stays and its addition of a statutory standard for injunctive relief make plain Congress's intention to render it more difficult for aliens to remain in the United States after the agency has rejected their claims. Because peti-

tioner's interpretation of the statute "runs afoul of the express policy and statutory structure Congress set out in IIRIRA, which vested much discretion in the Executive," it should be rejected. *Teshome-Gebreegziabher*, 528 F.3d at 334.

Petitioner's view also fails to give any operative effect to Section 1252(f)(2), see pp. 25-26, *supra*, and it is contrary to the well-settled principle that when Congress makes a change in the statutory text, that change should be given effect, see, *e.g.*, *Stone*, 514 U.S. at 397. Petitioner faults Congress for failing to explain in the legislative history that it intended Section 1252(f)(2) to apply to stays. Pet. Br. 39.[8] But this Court has long held that "legislative history need not confirm the details of changes in the law effected by statutory language before [it] will interpret the language according to its natural meaning." *Morales* v. *TWA*, 504 U.S. 374, 385 n.2 (1992). Here, the language of Section 1252(f)(2), read in light of IIRIRA's other measures to streamline removal of aliens from the United States, makes clear that it applies to stays of removal.

4. Petitioner points (Br. 39-40) to two rejected proposals as evidence that Congress did not intend Section 1252(f)(2) to apply to stays of removal. Failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute," *PBGC* v. *LTV Corp.*, 496 U.S. 633, 650 (1990), because "several equally tenable inferences may be drawn from such inac-

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[8] It appears that the only discussion of Section 1252(f)(2) in the legislative history is the statement that "courts may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 161 (1996) (*House Report*). That statement sheds little if any light on the question presented here.

tion, including the inference that the existing legislation already incorporated the offered change," *United States* v. *Craft*, 535 U.S. 274, 287 (2002) (internal quotation marks omitted). That is particularly true with respect to the proposals petitioner cites.

The first was a proposal considered in connection with the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, which would have amended Section 1252(b)(3)(B) to read: "Service of the petition * * * does not stay the removal of an alien pending the court's decision on the petition, unless *pursuant to subsection (f)* the court orders otherwise." H.R. 418, 109th Cong., 1st Sess. § 105(a)(2)(A) (2005) (emphasis added); see 151 Cong. Rec. H536, H538, H566 (daily ed. Feb. 10, 2005). That provision apparently was deleted from the bill by the Conference Committee, and the legislative record includes no explanation for the deletion or the inclusion of the language in the first place. Without more, there is no basis to make any assumptions about Congress's understanding in 2005, much less when it enacted Section 1252(f)(2) nine years earlier.

The second proposal is similarly unhelpful. It arose in the context of the proposed Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., 2d Sess. (Apr. 7, 2006), which never became law. It proposed to amend Section 1252(f)(2) to read: "[N]o court shall enjoin*, or stay, whether temporarily or otherwise*, the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." *Id.* § 227(c) (emphasis added). That provision was deleted during the floor debate in the Senate, see 152 Cong. Rec. S5146-S5153, S5188 (daily ed. May. 25, 2006), and was never consid-

ered by the House. That action sheds no light on Congress's intent in enacting Section 1252(f)(2) either, especially when compared to the "broad statutory language that Congress did enact." *Craft*, 535 U.S. at 288.

D. Applying Section 1252(f)(2) To Stay Requests Furthers Congress's Purposes In Enacting IIRIRA

This Court has explained that "the purposes underlying the [statute in issue] are most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it." *Dunn* v. *CFTC*, 519 U.S. 465, 474 (1997). That is particularly true here, because interpreting the broad term "enjoin" in Section 1252(f)(2) to encompass stays of removal furthers Congress's manifest purpose of expediting the removal of illegal aliens from the United States.

1. The legislative record demonstrates that Congress enacted IIRIRA to "expedit[e] the removal of excludable and deportable aliens, especially criminal aliens," from the United States. S. Rep. No. 249, 104th Cong., 2d Sess. 2 (1996) (*Senate Report*); see, *e.g.*, *House Report* 107-108 (purpose of IIRIRA was to "streamline[] [the] appeal and removal process"); *id.* at 157 (IIRIRA made it "easier to remove deportable aliens from the United States"); *Senate Report* 3 (key purpose of IIRIRA was to "expedite exclusion and deportation"). That paramount goal has been often acknowledged by the courts of appeals. See, *e.g.*, *Martinez* v. *Mukasey*, 519 F.3d 532, 544 (5th Cir. 2008); *Morales-Izquierdo* v. *Gonzales*, 486 F.3d 484, 494 (9th Cir. 2007) (en banc); *Appiah* v. *United States INS*, 202 F.3d 704, 707 (4th Cir. 2000).

Congress enacted IIRIRA on the understanding that "[t]he opportunity that U.S. immigration law extends to

aliens to enter and remain in this county is a privilege, not an entitlement." *Senate Report* 7. It noted that "[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others." *Ibid.*

Congress chose to take decisive action to deal with aliens who entered or remained in the United States illegally and then manipulated the system of judicial review to delay their removal. See *House Report* 122 (noting that illegal aliens often "frustrate removal through taking advantage of certain procedural loopholes in the current removal process"). Because "[e]xisting procedures to deny entry to and remove illegal aliens from the United States [were] cumbersome and duplicative," *id.* at 107, Congress acted to make removal easier.

Congress made clear its view that aliens "who violate U.S. immigration law should be removed from this country as soon as possible." *Senate Report* 7. "Exceptions" to that general rule were to be "provided only in extraordinary cases specified in the statute and approved by the Attorney General." *Ibid.* That scheme reflects Congress's policy judgment that the best way to permit judicial review while ensuring that aliens do not overstay their welcome is to enact a regime under which an alien who has "exhaust[ed] multiple levels of administrative review" should "be removed while his petition [for review] is pending, unless he satisfied the demanding standard of § 1252(f)(2)." *Teshome-Gebreegziabher*, 528 F.3d at 335.

2. Petitioner's contrary reading of the statute thwarts Congress's purposes. The standard petitioner advocates for assessing stays is significantly less de-

manding than the standard contained in Section 1252(f)(2). Choosing petitioner's standard would permit greater numbers of aliens whose claims have been denied by the agency to remain in the United States, which would directly "undercut Congress'[s] decision to expedite removals." *Teshome-Gebreegziabher*, 528 F.3d at 335.

Petitioner's standard for assessing stays of removal would encourage illegal aliens to file non-meritorious petitions for review in the courts of appeals simply for purposes of delay. That conclusion has been borne out by experience. In the Ninth Circuit—which enters a temporary automatic stay when a stay motion is filed, 9th Cir. Gen. Order 6.4(c)(1), and then uses the preliminary injunction standard for deciding that motion, *e.g.*, *Andreiu* v. *Ashcroft*, 253 F.3d 477, 480-482 (9th Cir. 2001) (en banc)—there was a 42 percent rate of filing a petition for review of Board decisions in 2007. Administrative Office of the U.S. Courts, *U.S. Courts of Appeals—Rate of Appeal for BIA Decisions—FY 2001-2007* (Dec. 3, 2007) (*Admin. Office Report*) (on file with the Administrative Office of the United States Courts). In contrast, in the Eleventh Circuit, which does not grant an automatic stay and which applies the more rigorous Section 1252(f)(2) standard, *e.g.*, *Weng*, 287 F.3d at 1336-1340, there was a 9 percent rate of filing a petition for review in 2007. *Admin. Office Report*.

Petitioner's case vividly illustrates the ways in which some aliens manipulate the system of judicial review to avoid removal. Petitioner entered the United States on a transit visa in 2001 and has remained here illegally for almost *eight years*. J.A. 8-9. Although an immigration judge determined that petitioner was not credible, J.A. 8-23, 32-37, and both the Board, J.A. 44-49, and the

court of appeals, J.A. 51-54, rejected his claims, petitioner has filed *three* motions to reopen his case, J.A. 58-68; A.R. 155-160, 283-289. Petitioner also filed a separate habeas corpus action as an end-run around the Board and the court of appeals. As a result of all of those efforts, petitioner has made five different submissions to the Board and presented claims to two different federal courts, one of which has already rejected his claims on two different occasions. Petitioner is now before this Court seeking a stay so that he can attempt to revive a claim that lacks merit, see pp. 48-52, *infra*, in order to continue delaying his removal from the United States. Application of Section 1252(f)(2) is necessary to return to the system Congress intended, under which it is only in "exceptional" cases that an alien is permitted to remain in the United States after the Board has rejected his claims.

3. Petitioner suggests a number of reasons why Congress might not have wanted to apply the Section 1252(f)(2) standard to stays of removal. Many of those arguments apply to *any* stay standard, and none of them provides a basis for disregarding Congress's policy judgment.

a. First, petitioner (Br. 41-42) and his amici (AILA Br. 21-29) suggest a number of potential practical problems with application of the Section 1252(f)(2) standard to stays of removal. Petitioner objects (Br. 41) that courts would be required to apply a more stringent standard for a stay pending removal than for relief on the merits. Section 1252(f)(2) directs courts not to enjoin an alien's removal unless the alien "shows by clear and convincing evidence that" removal "is prohibited as a matter of law." 8 U.S.C. 1252(f)(2). Most naturally read, that requires aliens to establish fact-based claims by

clear and convincing evidence and demonstrate on legal claims that they are entitled to judgment as a matter of law. See, *e.g.*, *Teshome-Gebreegziabher*, 528 F.3d at 335; *Weng*, 287 F.3d at 1340 & n.11. For fact-based claims, the standard would appear to be slightly less demanding than the highly deferential substantial evidence standard. See *Teshome-Gebreegziabher*, 528 F.3d at 335; see also *INS* v. *Elias-Zacarias*, 502 U.S. 471, 481 n.1, 483-484 (1992) (court may only reverse under substantial evidence review if "the evidence [the alien] presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution"); 8 U.S.C. 1252(b)(4)(B); see generally *Dickinson* v. *Zurko*, 527 U.S. 150 (1999). For purely legal claims, review is essentially de novo, similar to that on merits review, but with due regard to the need to grant relief with confidence in the limited time available to rule on the stay motion.

Even if the Section 1252(f)(2) standard required a more demanding showing for a stay than for success on the merits, that is a choice Congress is entitled to make. Congress has plenary authority over immigration policy. See, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587 & n.11 (1952). Rather than grant courts broad discretion to grant stays, Congress instead decided to vest that discretion with DHS. See 8 C.F.R. 241.6; see p. 31, *supra.*

Petitioner's amici erroneously suggest (AILA Br. 26-28) that the Section 1252(f)(2) standard is unfair because aliens seeking a stay do not have a full copy of the administrative record. An alien who appeals to the Board is provided a copy of the IJ decisions and transcript of his hearing, see 8 C.F.R. 1003.3(c)(1); *Board of Immigration Appeals Practice Manual* § 4.2(d), at 50

(July 30, 2004) <http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm> (*Board Practice Manual*), and he is served with copies of briefs and other documents filed by DHS, *Immigration Court Practice Manual* § 3.2, at 39-40 (Apr. 1, 2008) <http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm>; *Board Practice Manual* § 3.2, at 36-37. In addition, the alien would have copies of the documents he has filed. An alien therefore cannot credibly claim that he lacks the materials required to prepare a stay request.[9] In any event, this contention, like amici's other practical concerns (ALIA Br. 26-29), applies to a requirement to make *any* showing in order to obtain a stay.

b. Petitioner also contends (Br. 42-46) that the application of the Section 1252(f)(2) standard will lead to unjust results because some aliens with meritorious claims will be removed. Both the Section 1252(f)(2) standard and the preliminary injunction standard require petitioner to make a strong showing on the merits. Compare 8 U.S.C. 1252(f)(2) ("clear and convincing evidence" that removal is "prohibited as a matter of law"), with *Winter*, 129 S. Ct. at 374 (a "likel[ihood] [of] succe[ss] on the merits"). This argument, like many of petitioner's policy arguments, is "not really [an] argument[] against the § 1252(f)(2) standard," but is an "argument[]

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[9] Amici's concerns about aliens proceeding pro se (AILA Br. 23-24) likewise provide no basis to ignore Section 1252(f)(2). The Attorney General is required to "provide for lists (not updated less than quarterly) of persons who have indicated their availability to represent pro bono aliens" in removal proceedings and make that list generally available, 8 U.S.C. 1229(b)(2), and regulations require that aliens be provided with a list of free legal services located in the district where their removal hearing is held, 8 C.F.R. 1240.10(a)(1)-(3).

against *any* standard other than an automatic stay." *Teshome-Gebreegziabher*, 545 F.3d at 288 (Shedd, J., concurring in denial of reh'g en banc). A preliminary injunction is itself an "extraordinary and drastic remedy" that is not lightly granted. *Munaf* v. *Geren*, 128 S. Ct. 2207, 2218-2219 (2008). Section 1252(f)(2) sets forth a higher burden for an alien to meet, but that burden "is not insurmountable." *Teshome-Gebreegziabher*, 545 F.3d at 288-289 (Shedd, J., concurring in denial of reh'g en banc) (providing example of *Fernandez* v. *Keisler*, 502 F.3d 337 (4th Cir. 2007), cert. denied, 129 S. Ct. (2008), where the court granted a stay of removal "where it appeared that the [alien's] removal was prohibited by [circuit precedent]," but ultimately denied the petition for review because circuit precedent did not control the outcome of alien's case). A stay also would be appropriate, for example, where there is a clear administrative error or an erroneous interpretation of the statute and other requirements were satisfied.

Moreover, application of the Section 1252(f)(2) standard is unlikely to lead to the unjust results petitioner fears. By the time the alien presents his claim to the court of appeals, it will have been considered in multiple levels of agency review. See *Teshome-Gebreegziabher*, 545 F.3d at 289 (Shedd, J., concurring in denial of reh'g en banc). Many aliens seeking asylum succeed on their claims before the agency. See Executive Office for Immigration Review, *FY 2007 Statistical Yearbook*, A1 <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf> (in fiscal year 2007, IJs granted 46% of asylum applications). Contrary to petitioner's suggestion (Br. 43-44), if the Board denies relief, the court of appeals is likely to affirm that decision: the Board has an affirmance rate of over 90% in the courts of appeals. See Executive

Office for Immigration Review, *BIA Restructuring and Streamlining Procedures* 2 (Mar. 9, 2006) <http://www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf>.

Even if the alien's stay request is denied by the court of appeals, he has other avenues for relief. If the alien previously had applied for asylum or withholding of removal and circumstances have changed since the application was denied, he may file a motion to reopen and seek a stay of removal with the Board. See 8 C.F.R. 1003.2, 1241.6(b). Even in the absence of changed circumstances, he may seek a stay of removal from DHS, which maintains full discretion to permit him to remain in the United States if he would face harm abroad. See 8 C.F.R. 241.6. Petitioner's assertion (Br. 42) that "there is no mechanism" to prevent unjust results, therefore, is wrong.

Petitioner, an alien, also suggests (Br. 44-46) that application of the Section 1252(f)(2) standard would lead to removal of United States citizens. Petitioner has not offered evidence to suggest that DHS is likely to remove United States citizens, in the Fourth and Eleventh Circuits or anywhere else. Nonetheless, the potential for removal of a citizen is an issue that DHS takes very seriously. If an alien claims to be a citizen, United States Immigration and Customs Enforcement reviews the alien's file and all relevant databases to locate information supporting the citizenship claim. If documentation is discovered that indicates the individual is a citizen, he is released immediately. If the individual is placed in removal proceedings, DHS will encourage him to concurrently pursue a citizenship claim with the immigration court and United States Citizenship and Immigration Services to obtain an adjudication of citizenship. If

the individual is unable to establish citizenship through those avenues, he may seek a stay from the court of appeals as he pursues his petition for review. At that point, the INA provides that if "a genuine issue of material fact about the [individual's] nationality is presented," his claim will be transferred to a federal district court for a hearing. 8 U.S.C. 1252(b)(5). Under those circumstances, a stay would be granted, because removing the individual without such a hearing would be "prohibited as a matter of law." 8 U.S.C. 1252(f)(2). There is, therefore, no reason to refuse to apply the Section 1252(f)(2) standard because of fears about removal of United States citizens.

E. No Canon Of Construction Justifies Ignoring The Clear Import Of Section 1252(f)(2)

Petitioner and his amici invoke several canons of construction in order to avoid the application of Section 1252(f)(2) to motions for stays of removal. None provides a basis for doing so.

1. Petitioner suggests that his reading of the statute is supported by the proposition that Congress would not "deprive the Court of Appeals" of the power to "stay orders under review" "without clearly expressing such a purpose." Br. 19 (quoting *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 11 (1942)). That principle is inapplicable here for two reasons. First, Section 1252(f)(2) does not deprive the courts of appeals of the authority to enter stays; the INA authorizes them to enter stays, 8 U.S.C. 1252(b)(3)(B), but only if Section 1252(f)(2)'s standard is met. Second, in enacting IIRIRA, Congress clearly evidenced its intention to shift discretion from the courts to the Executive Branch. See *AADC*, 525 U.S. at 486 ("*[M]any* provisions of IIRIRA are aimed at

protecting the Executive's discretion from the courts."); see also *Scripps-Howard*, 316 U.S. at 10 (courts' stay authority should not be interpreted "without regard to the division of function which the legislature has made between the administrative body and the court of review").

2. Nor is there any basis for choosing petitioner's reading of the statute in order to avoid the purported Suspension Clause concerns advanced by petitioner's amici. See Law Professors Br. 7-16. That argument was not presented to or passed on by the court of appeals, and petitioner has not raised it here. See, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992). In any event, it lacks merit, because Section 1252(f)(2) in no way precludes a court from entering a stay of removal in an appropriate case, and amici cite no authority suggesting that an alien's claim for relief must be adjudicated under a more lenient standard. Indeed, this Court held in *Munaf*, even in the absence of a provision like Section 1252(f)(2), that a preliminary injunction is an "extraordinary and drastic" remedy in habeas corpus and requires a showing of at least a likelihood of success on the merits. 128 S. Ct. at 2219 (internal quotation marks omitted).

Importantly, the Suspension Clause has no application to petitions for review that challenge factual and discretionary rulings by the agency, because it is well-established that the writ of habeas corpus historically extended only to legal and constitutional questions, not factual and discretionary questions. *INS* v. *St. Cyr*, 533 U.S. 289, 306-310 (2001); see, *e.g.*, 9 W.S. Holdsworth, *A History of English Law* 120 (1926). Accordingly, even assuming that habeas required a certain interlocutory remedy for the questions properly in its scope, it would

require such a remedy only where there is a legal or constitutional error. Section 1252(f)(2) provides an effective remedy for such an error, for it permits courts to issue a stay when the alien is entitled to relief as a matter of law. 8 U.S.C. 1252(f)(2); see pp. 37-38, *supra*.

Moreover, in the ordinary case, an alien need not remain in the United States in order to pursue a legal or constitutional claim or benefit from a favorable judicial ruling. The court's review is based on the administrative record, see 8 U.S.C. 1252(b)(4)(A), and written legal briefs, 8 U.S.C. 1252(b)(3)(C), rather than in-person testimony. By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, *inter alia*, facilitating the aliens' return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal. Amici hypothesize instances in which aliens could be harmed in their home countries while awaiting judicial review, but application of the Section 1252(f)(2) standard readily accommodates stays in those extraordinary cases. If an alien can demonstrate that it is more likely than not that he actually will be persecuted or tortured if removed to his home country, he is entitled to relief under the INA's withholding of removal provision, 8 U.S.C. 1231(b)(3), and the CAT, and would satisfy the standard for a stay. Amici therefore have identified no constitutional concerns with giving effect to Section 1252(f)(2), much less the sort of "grave and doubtful" concerns, *Jones* v. *United States*, 526 U.S. 227, 239 (1999) (internal quotation marks omitted), that are required before invoking the canon of constitutional avoidance.

3. This also is not an appropriate case in which to resort to the proposition that ambiguities should be construed in favor of the alien. In *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948), the Court resolved an ambiguity in favor of the alien, observing that forfeiture of his residence for acts committed after his admission was a "penalty." See *INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello* v. *INS*, 376 U.S. 120, 128 (1964). The "penalty" theory is in significant tension with this Court's repeated acknowledgment that "[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

Moreover, such a rule cannot be justified in the immigration context by constitutional concerns such as fair notice, non-retroactivity of criminal statutes, and separation of powers, because aliens in immigration proceedings lack many of the procedural protections afforded in the criminal context. Compare *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971), with *Lopez-Mendoza*, 468 U.S. at 1038. To the extent that the rule has vitality, it should be applied only to persons lawfully present in the United States. See, *e.g.*, *INS* v. *Phinpathya*, 464 U.S. 183, 194 (1984) (distinguishing between "a *lawful* resident alien" and "an *unlawful* alien," because the latter "has no basis for expecting the Government to permit her to remain in the United States").[10]

In any event, a court may properly consider whether any remaining ambiguities should be resolved in favor of the alien only *after* the court had used every interpretative tool at its disposal. *E.g.*, *Ruiz-Almanzar* v. *Ridge*,

[10] Although this Court recently cited the principle in a case involving an alien who was in the United States illegally, it did not discuss the principle in any detail. *Dada*, 128 S. Ct. at 2318.

485 F.3d 193, 198 (2d Cir. 2007). There is no need to resort to application of lenity in this case, because Congress has made it clear that it does not wish to give the benefit of the doubt to aliens who enter or remain in the United States illegally. IIRIRA was enacted to make the prompt removal of aliens the norm, rather than the exception, see pp. 34-36, *supra*, and it was properly within Congress's "firmly established" "plenary * * * power to make policies and rules for exclusion of aliens," *Kleindienst* v. *Mandel*, 408 U.S. 753, 769-770 (1972). An abstract canon should not be employed to reject that judgment.

II. PETITIONER CANNOT IN ANY EVENT PREVAIL UNDER THE TRADITIONAL STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

Even if this Court were to decide that petitioner's stay motion should be evaluated using the four-part standard used for preliminary injunctive relief, rather than the Section 1252(f)(2) standard, it should affirm the court of appeals' order, because petitioner cannot prevail under that standard. At a minimum, this Court should reaffirm that the four-part standard requires a more demanding showing than petitioner suggests.

1. As an initial matter, this Court should reiterate that "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 129 S. Ct. at 376. Under the traditional four-part test for preliminary injunctive relief, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 374. At a minimum, even if the Court concludes that Section

1252(f)(2) does not provide the correct standard, that provision along with IIRIRA as a whole require strict adherence to the traditional four-part test.

Nonetheless, petitioner has suggested (Br. 3, 5) that a stay may be granted under this standard upon a showing of a mere "possibility" of relief. The en banc Ninth Circuit has agreed, holding that a stay should be granted if the alien demonstrates "either (1) a probability of success on the merits and the *possibility* of irreparable injury, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the petitioner's favor." *Andreiu*, 253 F.3d at 483 (emphasis added; internal quotation marks omitted). That is incorrect: as this Court recently admonished, the "'possibility' standard is too lenient." *Winter*, 129 S. Ct. at 375. The preliminary injunction standard "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction," and "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [this Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 375-376.

Some courts have also failed to apply a sufficiently stringent standard with respect to the merits showing required at the preliminary injunction stage. The Seventh Circuit, for example, has adopted a "sliding scale" approach "under which the more likely it is that the [alien] will succeed on the merits, the less the balance of irreparable harms need weigh toward [his] side" and "the less likely it is the [alien] will succeed, the more the balance need weigh toward [his] side." *Sofinet* v. *INS*, 188 F.3d 703, 707 (1999) (internal quotation marks omit-

ted). Applying that standard, the Seventh Circuit has granted stays when an alien showed a "better than negligible chance of success on the merits." *Id.* at 708 (internal quotation marks omitted). That approach improperly weakens the standard for preliminary injunctive relief, which requires a *likelihood* of success on the merits, *Munaf*, 128 S. Ct. at 2219, not a *chance* of success.

Finally, with respect to the traditional public interest factor, this Court should emphasize that, in exercising their discretion whether to grant a preliminary injunction, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376-377 (quoting *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982)); see also Pet. Stay Appl. 12-13 (ignoring public interest factor). Just as with respect to the national defense, Congress is due "great deference" in its determination that prompt removal of illegal aliens is in the public interest. *Winter*, 129 S. Ct. at 377 (internal quotation marks omitted); see *Mathews* v. *Diaz*, 426 U.S. 67, 82 (1976).

2. Applying the traditional four-factor standard, it is clear that petitioner cannot demonstrate that he is entitled to relief.

a. Petitioner cannot establish a likelihood of ultimate success on his challenge to the Board's denial of his third motion to reopen. Because petitioner's current motion to reopen was his third, and because it was filed more than 90 days after the entry of a final order of removal, petitioner was required to demonstrate changed country conditions using evidence that was "material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C.

1229a(c)(7)(C)(ii); 8 C.F.R. 1003.2(c)(3)(ii). Moreover, the denial of a motion to reopen on the ground "that the movant has not introduced previously unavailable, material evidence" is reviewable by courts only for "abuse of discretion." *INS* v. *Abudu*, 485 U.S. 94, 104-105, 110 (1988).

Petitioner is unlikely to establish that the Board abused its discretion in denying his third motion to reopen. The IJ did not deny petitioner's original application for asylum, withholding of removal, and protection under the CAT based on a conclusion about then-prevailing conditions in Cameroon. Instead, the IJ made "a specific adverse credibility finding," describing petitioner's testimony at the removal hearing as "incredible" and "improbable." J.A. 34-36; see *Huang* v. *Mukasey*, 534 F.3d 618, 622 (7th Cir. 2008) (upholding denial of motion to reopen by asylum petitioner previously found not to be credible who claimed changed country conditions), cert. denied, No. 08-490 (Dec. 8, 2008). The IJ also noted that certain documents—including a letter that petitioner claimed had been written by his brother—had not been properly authenticated and were otherwise suspect. J.A. 20-22. Those findings were expressly upheld by the Board, J.A. 45-47, and the court of appeals, J.A. 53, and they "remain[] undisturbed" in the current proceeding, J.A. 71.

As the Board correctly concluded, the evidence that petitioner submitted in connection with his current motion to reopen was not responsive to, and was thus not material in light of, the IJ's earlier adverse credibility finding. The Board imposed no per se requirement that an alien who seeks reopening of an asylum claim based on changed country conditions must invariably "submit a personal statement." Pet. Stay Appl. 11. Instead, it

simply recognized that, because "the Immigration Judge's adverse credibility determination remains undisturbed," petitioner's failure to "submit his own statement" explaining how "recent reports of civil unrest in Cameroon" affected his particular claim "[wa]s significant." J.A. 71; see *Huang*, 534 F.3d at 622 (documents submitted to support motion to reopen by alien who had "been found to have lied" about his asylum claim "were not evidence that could be assumed to be uncontaminated by his demonstrated propensity to lie to obtain asylum").

Petitioner is mistaken in suggesting that the Board "ignor[ed] material evidence" (Pet. Stay Appl. 9) by not adequately discussing the letter allegedly from his brother. The Board specifically identified that letter as one piece of evidence petitioner had submitted. J.A. 71. Especially in the context of successive motions to reopen, the Board is not required to address separately each piece of evidence submitted. See, *e.g.*, *Casalena* v. *United States INS*, 984 F.2d 105, 107 (4th Cir. 1993). And, even now, petitioner does not explain how that later-written, third-party letter could "rebut the adverse credibility finding that provided the basis for the IJ's denial of [his] underlying asylum application." *Kaur* v. *BIA*, 413 F.3d 232, 234 (2d Cir. 2005) (per curiam).

b. Nor can petitioner demonstrate that he satisfies the remaining requirements for obtaining a stay under the preliminary injunction standard.

Petitioner has not demonstrated irreparable injury. He asserts that a stay is warranted because he "may face arrest, torture, and death upon his removal to Cameroon." Pet. Stay Appl. 2; see *id.* at 12. But he must establish a likelihood, not merely a possibility, of irreparable harm. See p. 47, *supra*. Moreover, petitioner's

previous assertions concerning the likelihood of persecution were expressly rejected by the IJ, the BIA, and the court of appeals when petitioner first made them, based on the finding that petitioner's entire account was simply not credible. Especially because petitioner's claims about what will happen to him in Cameroon are premised on his assertions and on documents the agency has already deemed not credible, petitioner has not established a likelihood of irreparable injury.

Petitioner contends that the equities favor a stay because his removal would "leave behind his U.S. citizen wife and U.S. citizen young son." Pet. Stay Appl. 2; see *id.* at 12, 13. At the time of his 2004 marriage, however, petitioner had remained in the United States unlawfully for more than three years and had been ordered removed by the IJ. At the time his son was born in 2007, petitioner had remained in the United States unlawfully for nearly six years and was subject to a final order of removal. The fact that petitioner has now delayed his departure for almost eight years cannot itself furnish equitable reasons for permitting his unauthorized presence to continue even longer. Cf. *INS* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985) ("The purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability; it is not to permit an indefinite stalling of physical departure in the hope of eventually satisfying legal prerequisites.").

Significantly, petitioner also fails to address the other side of the balancing equation—the harm to the government and the public interest that would occur if a stay were granted. Petitioner has been found removable by the Executive Branch agency charged by Congress with making that determination, and that determination was upheld by a federal court of appeals in pro-

ceedings that became final well over a year ago. Petitioner's two previous attempts to reopen his long-concluded removal proceedings were rejected by the Board and the court of appeals. The Board has rejected this one as well, and the court before which petitioner's latest challenge is currently pending has denied his request for a stay of the underlying removal order. The government has been involved in litigation regarding petitioner's status for more than six-and-a-half years, and it wishes to execute the order of removal as soon as the necessary steps have been taken. See *Kenyeres* v. *Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in chambers). The government's interests are also harmed by petitioner's continued presence in the United States insofar as the government must bear the costs of detaining him (or, if he were released, of monitoring his whereabouts). Finally, the public interest would be harmed by permitting petitioner to remain in the United States, because "the consequence of delay * * * in deportation proceedings * * * is to permit and prolong a continuing violation of United States law." *AAADC*, 525 U.S. at 490.

Accordingly, even under the traditional four-part test, a stay of removal is not warranted.

CONCLUSION

The order of the court of appeals denying petitioner's motion to prevent his removal should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and

sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive

means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this par-

agraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to section 1252(b)(4)(B) of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28, United States Code.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

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[1] See Reference in Text note below.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been

presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is

an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive,

guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review

of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

2. 8 U.S.C. 1105a (1994) provided, in pertinent part:

Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

* * * * *

(3) Respondent; service of petition; stay of deportation

the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs or unless the alien is convicted of an aggravated felony (including

an alien described in section 1252a of this title), in which case the Service shall not stay the deportation of the alien pending determination of the petition of the court unless the court otherwise directs;

* * * * *

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceedings took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

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